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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA PATSY,

Petitioner

—v.—

BOARD OF REGENTS OF THE STATE OF FLORIDA, A BODY CORPORATE, FOR AND ON BEHALF OF FLORIDA INTERNATIONAL UNIVERSITY,

Respondents.

ON WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

Whether under well-established flexible rules of judicial administration courts may defer the exercise of jurisdiction pending a § 1983 claimant's resort to "plain, adequate and available" state administrative remedies?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	10
I. A FLEXIBLE EXHAUSTION RULE WOULD ACCOMMODATE AND PROMOTE IMPORTANT CONSTITUTIONAL, CONGRESSIONAL AND JUDICIAL POLICIES:	
A. Full Protection Of Constitutional Rights	12
B. Federalism And Comity	15
C. Faithfulness To The Purposes Of The 42nd Congress . . .	19
D. Assuring The Existence Of Jurisdiction	25
E. Promotion Of Contemporary Congressional Policies	30
F. Judicial Policies . .	32
G. Elimination Of Unfairness And Potential Due Process Concerns . .	33

Page

II. STARE DECISIS DOES NOT PRECLUDE THE COURT FROM ADOPTING A FLEXIBLE EXHAUSTION RULE. 34

A. Beginning With McNeese, The Court's Administrative Exhaustion Cases, Upon Clarification, Fit Within The Mainstream Of Traditional Exceptions To The Court's Well-Established Exhaustion Doctrine 34

B. Even If Clarification Of The Court's Prior Decisions Alone Would Not Permit Adoption Of A Flexible Exhaustion Rule, Stare Decisis Would Not Preclude This Choice 39

III. CONGRESS HAS NOT PRECLUDED THE ADOPTION OF A FLEXIBLE RULE IN § 1983 CASES. 43

A. Congress Has Consistently Respected Procedural Rules Of Judicial Administration By Which Federal Courts Historically Have Deferred The Exercise Of Jurisdiction Under Otherwise Unqualified Statutory Grants . . 43

Page

B. The Most Probative Evidence Demonstrates Congressional Acceptance Of A Flexible Exhaustion Rule . . . 47

C. § 1997e Does Not Preclude The Adoption Of A Flexible Exhaustion Rule 51

D. Petitioner's "Only Congress Can Act" Policy Arguments Misconstrue The Function Of A Flexible Rule And Ingnore The Role The Federal Courts Have Historically And Quite Ably Played In The Application Of Statutory Or Constitutional Law To Individual Cases . . 61

IV. THOUGH PREMATURE, AN ANALYSIS OF THE ADMINISTRATIVE REMEDIES AVAILABLE TO PETITIONER DEMONSTRATES THEIR ADEQUACY, APPROPRIATENESS, AND SIMPLICITY . . 65

CONCLUSION 71

TABLE OF AUTHORITIES

Cases:	Page
Allen v. McCurry, 449 U.S. 90 (1981)	20,25
Baker v. McCollan, 443 U.S. 137 (1979)	12,27
Bell v. Hood, 327 U.S. 678 (1946)	27
Board of Regents v. Tomanio, 446 U.S. 478 (1980)	14
Board of Regents v. Roth, 408 U.S. 564 (1972)	36
Brown v. GSA, 425 U.S. 820 (1976)	34,42
Carlson v. Green, 446 U.S. 14 (1980)	31
Chardon v. Fernandez, 50 U.S.L.W. 3341 (Nov. 23, 1981)	30
City of Columbus v. Leonard, 442 U.S. 905 (1979)	20,39
Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821)	37
Collins v. Hardyman, 341 U.S. 651 (1951)	22
Consumer Product Safety Comm. v. GTC Sylvania, 447 U.S. 102 (1980)	40

Page

Delaware and Hudson Company v. United States, 266 U.S. 438 (1924) 11

Dickerson v. Rose, 398 So.2d 922 (Fla. 1st DCA 1981) 66

Dothard v. Rawlinson, 433 U.S. 321 (1977) 66

Ex Parte Royall, 112 U.S. 181 (1884) 10,44

Ex Rel, Dept. of Gen. Serv. v. Willis, 344 So.2d 580 (Fla. 1st DCA 1977) 66

FAIR v. McNary, No. 80-427, 50 U.S.L.W. 4017 (Dec. 1, 1981) . . . . . Passim

Garcia v. Gloor, 609 F.2d 156 (5th Cir. 1980) 55

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) . . 43

Girouard v. United States, 328 U.S. 61 (1945) 38

Glidden Co. v. Zdanok, 370 U.S. 530 (1962) 25

Great American S & L Assn. v. Novotny, 442 U.S. 366 (1979). . . 18

Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943) 24

Page

Hertz v. Woodman, 218 U.S. 205 (1909) 38

Huffman v. Pursue, Ltd., 420 U.S. 542 (1975) 12,16, 17,25, 44

Humphrey v. United States, 295 U.S. 602 (1935) 37

Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324 (1979) 40

Johnson v. Railway Express Agency, 421 U.S. 454 (1975) . . . 32

Lane v. Wilson, 307 U.S. 268 (1939) 11,44, 47

Levers v. Anderson, 326 U.S. 219 (1945) 14

Lucky v. Board of Regents, 26 Empl. Prac. Dec. (CCH ¶ 32,071) (S.D. Fla. 1981) . . . 28

McGee v. United States, 402 U.S. 479 (1972) 55

McKart v. United States, 395 U.S. 185 (1969) 11

McNeese v. Board of Education, 373 U.S. 668 (1963) . . . . . Passim

Marbury v. Madison, 1 Cranch (U.S.) 43 (1803) 43

Page

Marino v. Ragen, 332 U.S. 561 (1947) 14

Monell v. Department of Social Services, 436 U.S. 658 (1978) . . 39,42

Monroe v. Pape, 365 U.S. 167 (1961) . . . . . Passim

Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) 10,11

Nat'l League of Cities v. Usery, 426 U.S. 833 (1976). . . . 17

Natural Gas Pipeline Co. of America v. Slattery, 302 U.S. 300 (1937). 10

Oscar Mayer v. Evans, 441 U.S. 750 (1979) 40

Parisi v. Davidson, 405 U.S. 34 (1972) 11

Parratt v. Taylor, 263 U.S. 514 (1981) . . . . . Passim

Paul v. Davis, 424 U.S. 693 (1976) 12,23

Pennsylvania v. Williams, 294 U.S. 176 (1934) 24

Petroleum Exploration, Inc. v. Pub. Serv. Comm. of Kentucky, 304 U.S. 209 (1938) 10

Polk County v. Dodson, ____ U.S. ____, 50 U.S.L.W. 4077 (1981) . . 12,29

Page

Porter v. Investors Syndicate, 286 U.S. 461 (1932) 10

Prentis v. Atlantic Coastline Co., 211 U.S. 210 (1908) . . . . Passim

Public Serv. Comm. of Utah v. Wycoff Co., 344 U.S. 237, 247 (1952) 17

Rizzo v. Goode, 423 U.S. 362 (1976) 16,17, 28

Runyon v. McCrary, 427 U.S. 160 (1976) 39

Screws v. United States, 325 U.S. 91 (1945) 16

Smith v. Allwright, 321 U.S. 649 (1943) 38

TVA v. Hill, 437 U.S. 153 (1978) 40

United Airlines v. Evans, 431 U.S. 553 (1977) 45

United States v. Clark, 445 U.S. 23 (1980) 40

Wade v. Mayo, 334 U.S. 672 (1948) 14

Younger v. Harris, 401 U.S. 37 (1946) 15,44

STATUTES AND RULES:

	Page
28 U.S.C. § 2254	46
42 U.S.C. § 1981	31,32
42 U.S.C. § 1983	Passim
42 U.S.C. § 1988	31,63
42 U.S.C. § 1997	48
42 U.S.C. § 1997e	Passim
42 U.S.C. § 2000a	31,62
42 U.S.C. § 2000e	31,32, 45,69
Fla. Stat. Ann. § 23.167	66,68, 69
Fla. Stat. Ann. § 110.105(2)	65
Fla. Stat. Ann. § 112	65
Fla. Stat. Ann. § 120	66
Fla. Stat. Ann. § 120.57	66
Fla. Stat. Ann. § 120.68	67
Fla. Stat. Ann. § 127.167(13)	67
Fla. Adm. Code Ch. 6C8-4.05	66
Fla. Adm. Code Ch. 9D-9	66
Fla. Adm. Code Ch. 22A-7.12	66
Fla. Adm. Code Ch. 22A-10.01	66
Fla. Adm. Code Ch. 22K	66
Fla. Adm. Code Ch. 22M	66
Fed. R. Civ. P. 6(b)	44
Fed. R. Civ. P. 12(b)	2
Fed. R. Civ. P. 13	44
Fed. R. Civ. P. 15	44
Fed. R. Civ. P. 16	44
Fed. R. Civ. P. 19	44
Fed. R. Civ. P. 20	44
Fed. R. Civ. P. 23	44,64
Fed. R. Civ. P. 24	44
Fed. R. Civ. P. 41	44
Fed. R. Civ. P. 65	63

Page

CONSTITUTIONAL PROVISIONS:

U.S. Const. Art. I 25
U.S. Const. Art. III 25,37, 46
U.S. Const. Amend. V 34
U.S. Const. Amend. XIV . . . . . Passim
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Page

125 Cong. Rec. S 6694 (daily ed. May 24, 1979) 60

125 Cong. Rec. H 3638 (daily ed. May 23, 1979) 48

124 Cong. Rec. 15445 (1978) 60

124 Cong. Rec. 11982 (1978) 52

124 Cong. Rec. 11976 (1978) 60

123 Cong. Rec. H 5257 (daily ed. April 27, 1977) 49

123 Cong. Rec. H 3181 (daily ed. April 6, 1977) 49

123 Cong. Rec. H 2547 (daily ed. March 23, 1977) 49

123 Cong. Rec. H 1756 (daily ed. March 7, 1977) 49

123 Cong. Rec. S 124 (daily ed. Jan. 10, 1977) 49

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Brennan, State Constitutions And The Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977)	72
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STATEMENT OF THE CASE

I. COMPLAINT

Between June, 1972, and February, 1979, plaintiff-petitioner, a qualified white female, unsuccessfully applied for at least thirteen other positions at Florida International University ("FIU"). (JA 31-33)[1] Instead of plaintiff, "many Latins and other non-whites" were selected. (JA 32) Generally alleging that applicant "minority preference" policies and promotion practices at FIU discriminated against her on the basis of "race and/or sex", plaintiff sued the Board under § 1983. (JA 30,31,34,36)

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1 References are to the Amended Complaint (JA 29-57) filed against the Board of Regents of the State of Florida ("Board"). It is identical to the original Complaint filed against FIU which the district court dismissed based on FIU's lack of legal capacity to be sued. (JA 1-11, 25-27).

Primarily seeking declaratory and equitable relief (promotion to the "next available position" or one-half million dollars in actual and exemplary damages), plaintiff contended that an actual "due process" controversy existed with FIU, that she was "in doubt as to her status and rights under the Constitution," and that she would suffer "irreparable injury" because she lacked any "plain, adequate, or speedy remedy at law." (JA 22, 36-39)

II. DISMISSAL

The Board moved to dismiss because, inter alia,[2] plaintiff had yet to pursue adequate and available state administrative remedies (hereinafter "Exhaustion").

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2 The other Rule 12(b), Fed. R. Civ. P., motions raised issues concerning the Board's "non-person" status under § 1983 and whether plaintiff's allegations of respondeat superior and FIU's commitment to "affirmative action" stated claims upon which relief could be granted. Alternatively, the Board moved for a more definite statement. (JA 58-59, 62-80)

(JA 58, 65-71) In response, plaintiff did not contest these facts but argued that exhaustion was unnecessary. (JA 86-87) Without addressing the Board's other motions, the district court dismissed for failure to exhaust. (JA 92)

III. APPEAL

The Fifth Circuit panel, (Godbold, J.) reversed per curiam. On rehearing en banc, the original panel joined fourteen other members of the court in Judge Roney's majority opinion vacating the panel's "iron-clad" no-exhaustion rule. In concluding that exhaustion "should sometimes precede federal court consideration of § 1983 claims," the majority initially analyzed the holdings of this Court's § 1983 cases, and found no contrary "iron-clad" rule. (PA 4a, 13a-31a) In addition, the court gave detailed consideration to this Court's exhaustion

doctrines (PA 5a-12a); the positions among the circuits (PA 31a-36a); and the purposes and intent of Congress in enacting § 1983 - finding exhaustion "wholly consistent" with the applicable Congressional purposes outlined by this Court in Monroe v. Pape, 365 U.S. 167, 173-74 (1961). (PA 31a-40a) Noting the absence of any res judicata or collateral estoppel effects from exhaustion, the court emphasized that the "proper focus" should be on relief from the wrong. (PA 40a-41a)

In adopting a flexible rule, the majority found that exhaustion would promote five primary, controlling factors: (1) judicial efficiency; (2) "institutional ripeness"; (3) improvement of state procedures; (4) simpler, speedier, and less expensive remedies for the parties; and (5) federalism and comity:

focusing on "the end [-not the beginning-] of state action" to confirm the necessity for any federal protection; respecting the state procedures and rules which federal courts have helped to develop; and even treatment of state and federal defendants. (PA 41a-49a) Finally, under the majority's opinion, no § 1983 claimant must resort to administrative channels before filing suit unless those remedies satisfy certain "minimum conditions"[3] and the need for exhaustion in light of the particular claims asserted justifies their pursuit. (PA 50a-51a)

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3 "First, an orderly system of review or appeal must be provided by statute or written agency rule. Second, the agency must be able to grant relief more or less commensurate with the claim. Third, relief must be available within a reasonable period of time. Fourth, the procedures must be fair, and not unduly burdensome, and must not be used to harass or otherwise discourage those with legitimate claims. Fifth, interim relief must be available, in appropriate cases, to prevent irreparable injury and to preserve the litigant's rights under § 1983 until the administrative process has been concluded." (PA 50a)

Finding the record inadequate to make these considerations in the case sub judice, the majority remanded with instructions to permit plaintiff to amend her complaint, and then to determine whether prior resort to administrative channels should be required. (PA 52a-55a)

SUMMARY OF ARGUMENT

A flexible exhaustion rule in § 1983 jurisprudence can accommodate, perhaps uniquely, two basic duties of the federal courts: protection of constitutional rights when necessary and preservation of "Our Federalism". Similar procedural "deferral" rules of judicial administration have historically served to allocate limited judicial resources among persons and issues most in need. As such, a flexible exhaustion rule neither displaces a federal § 1983 remedy nor bars the courthouse doors. Rather, it serves to

control the exercise of increasingly taxed federal judicial authority until appropriate: immediately if necessary, or as the unifying final word. At the same time the rule promotes "most persuasive" Constitutional, Congressional, and judicial policies.

Contrary to the historically ironic and misplaced, if not inaccurate assertions of petitioner and her amici, neither Congressional intent nor stare decisis would preclude a decision by the Court to accept this compellingly persuasive accommodation.

An "iron-clad" no-exhaustion rule for § 1983 cases would unnecessarily stand apart from the Court's well-established flexible exhaustion doctrines. Despite the Court's use of seemingly categorical language in prior § 1983 cases, as scholarly commentators and other lower courts have long espoused, analysis can clarify

their holdings and, without reversal, place them in the mainstream of exhaustion law. However, even if clarification would not alone accomplish that task, stare decisis, a flexible doctrine which accommodates change as institutions develop, should not impede this increasingly warranted change.

A flexible exhaustion rule would promote the important remedial objectives of the 42nd Congress which the concluding plain language of § 1983 - "or other proper proceeding for redress" - would hardly preclude. Of course, any intent imputed to the Congress in 1871 concerning prior resort to "plain, adequate, and available" state administrative remedies stands as an historical anachronism. As a result, the central relief aims of § 1983 in tandem with the other persuasive Constitutional and judicial policies served by the rule should prove

determinative. Plaintiff's remaining Congressional and policy "barriers," aside from inaccuracies, quickly fade upon proper construction of a flexible exhaustion rule.

Unless the Court imposes an iron-clad no-exhaustion rule or adopts one substantially different from that below, the prior remand to the district court for its initial application should remain unaltered. Petitioner raises her first objections to the availability or adequacy of administrative remedies in this Court. Thus, the record lacks some of the relevant facts necessary to resolve them. Of course, the nature of those administrative remedies stand as matters of state public record. Should the Court elect to pass judgment on their adequacy, assuming their availability, that record, under proper construction of the lower court's rule, contradicts petitioner's misplaced adequacy arguments.

ARGUMENT

I. A FLEXIBLE EXHAUSTION RULE WOULD ACCOMMODATE AND PROMOTE IMPORTANT CONSTITUTIONAL, CONGRESSIONAL AND JUDICIAL POLICIES:

Flexible rules of judicial administration which serve to defer the exercise of federal jurisdiction find deep roots in the Court's jurisprudence. E.g., Ex Parte Royall, 117 U.S. 241 (1884). With the advent in this century of administrative remedies and recognition that their use prior to seeking relief in court could serve compelling Constitutional and judicial policies, flexible exhaustion rules developed. Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908); Porter v. Investors Syndicate, 286 U.S. 461 (1932); Natural Gas Pipeline Company of America v. Slattery, 302 U.S. 300 (1937); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); Petroleum Exploration, Inc. v. Public Service Commission of Kentucky, 304 U.S. 209

(1938); Lane v. Wilson, 307 U.S. 268, 274 (1939); McKart v. United States, 395 U.S. 185 (1969); FAIR v. McNary, ____ U.S. ____, 50 U.S.L.W. 4017 (1981); see, generally Comment, Exhaustion of State Administrative Remedies in Section 1983 Cases, 41 U. Chi. L. Rev. 537 (1974). Predicated not on the denial of jurisdiction but on its "most proper and orderly" exercise, administrative exhaustion doctrines became an increasingly important tool of judicial administration. Prentis, 211 U.S. at 232; Myers v. Bethlehem Shipbuilding Corp., supra; McKart v. United States, supra at 193-195; Parisi v. Davidson, 405 U.S. 34 (1972); see Comment, 41 U. Chi. L. Rev., supra at 540-542; K. Davis, Administrative Law Treatise § 20.01 et seq. (1958), Cf. Delaware and Hudson Company v. United

States, 266 U.S. 438; 2 F. Cooper, State Administrative Law 573 (1965) (primary jurisdiction). A flexible rule for § 1983 cases would also promote the compelling policies which that body of precedent has long served while at the same time remain faithful to the central purposes of the 42nd Congress and the role of federal courts in the necessary protection of Constitutional rights.

A. Full Protection of Constitutional Rights

Unlike some of the Court's permanent restrictions on the "broad swath" cut by the literal scope, or availability of § 1983 relief,[4] the rule imposes no

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4 Polk County v. Dodson, ___ U.S. ___, 50 U.S.L.W. 4077 (1981); Parratt v. Taylor, ___ U.S. ___, 49 U.S.L.W. 4509 (1981); Baker v. McCollan, 443 U.S. 137 (1979); Paul v. Davis, 424 U.S. 693 (1976). Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); See generally Developments in the Law Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1172, 1190-1249 (1977).

substantive limitations. At most it defers rather than displaces a federal § 1983 remedy until appropriate or necessary. Cf., FAIR v. McNary, ____ U.S. ____, 50 U.S.L.W. 4017, 4023 n.4-5, 4027 (1981) (Brennan, J., concurring). Most importantly, should "irreparable injury" to the claimant or other appropriate circumstances warrant, a flexible exhaustion rule provides the federal trial courts with familiar discretion to exercise judicial authority immediately. In addition, in every case after resort to administrative procedures the courts may speak the final, unifying word if needed.

Application of a flexible rule would not require claimants to pursue remedies seriatim or endure legally damaging delays. Apart from "minimum conditions," note 3, supra, which expressly preclude this "short parade of horribles," the decision also invokes a substantial body

of exhaustion precedent which could preclude the need for claimants to pursue multiple administrative remedies. Marino v. Ragen, 332 U.S. 561, 568-69 (1947); Wade v. Mayo, 334 U.S. 672, 677-78 (1948); Levers v. Anderson, 326 U.S. 219, 222-23 (1945). Moreover, plaintiff would not risk having her federal claim time-barred by administrative delay: the Court's decision in Board of Regents v. Tomanio, 446 U.S. 478, 490 (1980), already contains the seeds of a federal tolling doctrine.

Further, apart from suggestions of harassment, lack of common sense, or the need for immediate federal intervention, a state agency would undoubtedly face a successful waiver or estoppel argument in attempting to rely upon a limitation period bar while a claimant resorted to requisite administrative procedures. Also, claimants would not risk loss of a federal forum under the rule by "guessing

wrong" on the need to exhaust and filing suit. If no remedy were then "available" (because administrative filing deadlines had run which the agency would not or could not waive), then the failure to waive would constitute final state action and a federal court action would proceed.

Finally, given the realities of federal civil dockets, a flexible rule would generally promote speedier relief for meritorious claims either during the administrative process itself or by having sharpened the facts and issues and developed a record for more expeditious judicial review.

B. Federalism And Comity

Judicial preservation of "Our Federalism" has fortunately enjoyed an enduring, though variable, history - one which the 14th Amendment and § 1983 did not rewrite. E.g., Younger v. Harris, 401

U.S. 37, 44 (1971); Screws v. U.S., 325 U.S. 91, 109 (1945).[5] Of course, neither comity nor federalism can serve to subvert necessary federal protection of Constitutional rights, and the decision below does not suggest otherwise. As one commentator has noted, 29 Stan. L. Rev. supra at 1205, "[t]he task has always been to find an accommodation" - a task for which a flexible rule would prove well-suited. Unlike the abstention doctrine coupled with principles of res judicata and collateral estoppel, a flexible exhaustion rule carries no potential for denying access to a federal court if necessary.

To be sure, federalism and comity have historically found widest recognition

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5 See also, Rizzo v. Goode, 423 U.S. 362, 379-80 (1976); Huffman v. Pursue, 420 U.S. at 599-612. See generally Developments, 90 Harv. L. Rev., supra; Weinberg, The New Judicial Federalism, 29 Stan. L. Rev. 1191 (1977); Durschlag, Federalism and Constitutional Liberties: Varying The Remedy To Save The Right, 54 N.Y.U. L. Rev. 723 (1979).

in the context of pending state proceedings. However, they have enjoyed other applications - relevant to the case at hand - as well. E.g., Huffman v. Pursue, Ltd., supra (no state appeal pending); National League of Cities v. Usery, 426 U.S. 833 (1976) (state employment decisions);[6] Rizzo v. Goode, 423 U.S. at 366-80 (injunctive relief against state officials who are not the culpable parties); Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 247 (1952) (interference with state administrative procedures). Indeed, an iron-clad no-exhaustion rule carries as much, if not greater potential for interference with

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6 This is not to suggest that federalism immunizes public employment discrimination from federal scrutiny. However, where, as here, see PART IV, infra, a state has extensive constitutional, statutory, and administrative prohibitions against such discrimination, and adequate procedures for redress of violations, notions of federalism should argue forcefully for a flexible exhaustion rule.

state "self-policing" procedures and institutions by permitting parties to bypass them completely than does selective interference with pending proceedings where, as here, only the claimants can invoke them in any event. Cf., Great American S. & L. Assn v. Novotny, 442 U.S. 366 (1979).[7] Given the roles played by Congress and the federal courts in developing many state administrative procedures, it would prove an unnecessary and unintended historical irony for courts now to permit, rather woodenly, the atrophy of these same procedures.

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7 Petitioner's repeated refrain that "plaintiffs will always choose the 'fairest' forum should be dismissed on grounds of common sense. Plaintiffs and their attorneys will most likely choose the most advantageous forum. If one forum presented, for example, greater risks and expenses for defendants, plaintiffs may choose it in order to enhance settlement. Under petitioner's "free market" system, to compete the state would need to develop equally disadvantageous forums for its defendant agencies or ones which are clearly pro-claimant. Neither alternative, however, would serve the goal of providing more fair or just forums.

C. Faithfulness To The Purposes Of The 42nd Congress

A flexible exhaustion rule and the Congressional purposes which underlie § 1983 enjoy a striking functional similarity: necessity. The legislative history makes clear that necessity led to the creation of this federal remedy for the protection of constitutional rights. Monroe v. Pape, 365 U.S. 167 (1961). A flexible exhaustion rule promotes the same concerns: exercising federal judicial authority when necessary for the protection of constitutional rights.[8] Indeed, as the court below and other scholars have emphasized, a flexible exhaustion rule promotes the applicable purposes of this 1871 statute. (PA 38a-40a). See

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8 The proponents of the legislation carefully noted that the Civil Rights Act of 1871 was intended to "preserve intact the autonomy of the States, the machinery of the State governments, and the municipal organizations established under State laws." Congressional Globe, 42nd Congress, 1st Sess. (hereinafter "Globe") 808 (1871).

generally Comment, 41 Univ. Chicago L. Rev., supra, at 553 (1974); Developments, 90 Harv. L. Rev. supra at 1264-74.

As others have advocated, Id., the "supplemental remedy" language of Monroe v. Pape finds no functional support in the Congressional purposes underlying § 1983 - at least as applied in the context of exhaustion of administrative remedies. See also, City of Columbus v. Leonard, 443 U.S. 905, 906 (1978) (Rehnquist, J.) (dissent from denial of certiorari). As Justice Douglas concluded over two decades ago, Congress in 1871 was concerned with post-war passions or prejudices, state laws (even where adequate) not being enforced, and with Constitutional rights being denied. Monroe v. Pape, 365 U.S. at 173-180. Since the 42nd Congress was also aware of principles of judicial finality, Allen v. McCurry, 449 U.S. 90 (1981), its post-Civil War fears provide historic

accuracy for the conclusion that in 1871 Congress intended a federal remedy supplemental to any state judicial remedy.[9] However, these forum-denying concerns have no application to administrative remedies that carry no res judicata or collateral estoppel baggage.

As petitioner emphasizes, flexible rules of judicial administration did not develop into a formal exhaustion doctrine until well into the next century. (PB 30-31) Thus, Congress in 1871 could not have intended to require prior resort to state administrative remedies. However, the converse must also be true: Congress could not have considered and intended to forbid application of a

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9 The federal judicial remedy, if supplemental, is not exclusive. Jurisdiction over § 1983 actions is clearly concurrent. Congressional Globe Appendix, 42nd Congress, 1st Sess. (hereinafter "Globe App.") 86 (Storm); Globe App. 69 (Shellabarger).

well-founded rule of judicial administration.

Despite this historical anachronism, the plain language of § 1983, particularly when coupled with the absence of any evidence in the legislative history to suggest that Congress specifically considered and rejected the application of a flexible exhaustion rule,[10] support the

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10 Although the Civil Rights Act of 1871 was the subject of considerable debate and controversy, Collins v. Hardyman, 341 U.S. 651, 657 (1951), comparatively little concern or emphasis was placed on the section that is now codified as § 1983. See, e.g., Globe App., 310 (Maynard) ("I suppose there is not much objection to [§ 1983], for the fact that so far there has been very little said about it. It simply declares in substance that whoever interferes with the rights and immunities granted to the citizens by the Constitution of the United States, though it may be done under state law or state regulation, should not be exempt from responsibility"); Globe App. 313 (Burchard). The discussion by Senator Thurman at Globe 770 indicates nothing to the contrary, despite the efforts of amicus NAACP to consider it so. An accurate reading of Thurman's statements demonstrates that he never proposed an exhaustion or notification requirement, he merely cites as an example of proper federalism an English statute requiring notice (not exhaustion) to local officials before suit can be brought.

conclusion that Congress did not intend to preclude possible administrative faithfulness to the purposes which motivated § 1983.[11] The concluding language of the statute, "or other proper proceeding for redress," justifies the conclusion that means other than federal suits in equity or law may be appropriate avenues for providing relief for violations of constitutional rights.[12] Moreover, the "plain language" fact that Congress specifically granted the federal courts

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11 Indeed, if, as petitioner argues, an imputed intent of the 42nd Congress to deny application of a rule that did not exist should control the exhaustion issue before the Court, then clearly petitioner's employment discrimination claims should not be in court at all. A review of the legislative history of § 1983 by its "deafening silence" convincingly suggests that "it would come as a great surprise [to the 42nd Congress]... to learn that [in the 20th century it was being used to redress public employment discrimination.]" Paul v. Davis, 424 U.S. 693, 699 (1976).

12 There appears to be no articulation by the framers of the intended meaning of this language. It is not inconceivable that Congress intended to leave open a door for development of future avenues of relief.

"equity jurisdiction," under which the courts had historically imposed controls on the exercise of jurisdiction, can hardly be read to support the clear conclusion petitioner seeks to draw.[13]

In sum, the plain language of § 1983 as well as the legislative history support the conclusion that the 42nd Congress was most concerned with relief against constitutional violations at a time when a state judicial forum was thought to be inadequate and a federal forum was viewed as necessary. To argue that these circumstances preclude the application of a flexible exhaustion rule, by which constitutional claimants over a century later can seek adequate relief administratively with no harm to any necessary access to a

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13 E.g., Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 297-98 (1943); Pennsylvania v. Williams, 294 U.S. 176, 185 (1934). This flexibility has compelling application to a complaint like petitioner's which primarily seeks to invoke the court's equity jurisdiction.

federal court, inverts Congressional purposes and elevates "forum over substance." The Court's modern cases, which may often have the result of denying a constitutional claimant access to a federal forum, underscore the 42nd Congress' primary concern in passage of § 1983 - the availability of substantive relief, not merely a federal forum. Huffman v. Pursue Ltd., supra; Allen v. McCurry, supra.

D. Assuring The Existence Of Jurisdiction

Unlike Article I Courts over which Congress exercises control without Article III constraints (e.g., the Court of Claims in 1871),[14] jurisdiction of the federal courts only extends to actual cases or controversies. See generally Developments, 90 Harv. L. Rev. at 1292-1300. The Court has recognized this jurisdictional

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14 See Glidden Co. v. Zdanok, 370 U.S. 530, 531 (1962).

limitation under different doctrines including the requirement that exhaustion of nonjudicial remedies may be necessary to assure "ripeness" of a claim for adjudication. Id. (citations omitted); Prentis, supra at 229. This Article III principle has compelling application to the case sub judice.

Plaintiff's alleged controversy exists as a result of hiring decisions made by unnamed personnel at FIU. Prior to being named as a party defendant in this lawsuit, the Board had no involvement with petitioner. That FIU lacks the capacity to be sued under state law, does not create a "controversy" with the Board. Petitioner readily could have sued the President of FIU in his official capacity or those persons who actually made the challenged hiring decisions. At a minimum, exhaustion should be required in this case before plaintiff can subject

this defendant to federal court jurisdiction for alleged constitutional wrongs for which it lacks any factual responsibility. Even if the Court fully accepts plaintiff's allegations that the Board's status as a defendant is merely on behalf of FIU, this conclusion should remain unchanged.

It is also axiomatic that federal jurisdiction to grant relief extends only to properly stated claims. Baker v. McCollan, 443 U.S. 137 (1979); cf. Bell v. Hood, 327 U.S. 678 (1946). Yet, the allegations against the Board rest at most on principles of respondeat superior, Parratt v. Taylor, supra at 4511 n.3; and, even if the Board is viewed only as a representative of FIU, plaintiff's conclusory allegations of "policies" and "patterns" of reverse discrimination fail to provide a proper predicate for the existence of a "controversy" with FIU or

the Board.[15] Rizzo v. Goode, supra at 371-72. Given these conclusory allegations, application of a flexible exhaustion rule, with no harm to claimant, should precede this institutional defendant having to answer them as they presently fail to support the existence of a policy controversy.

The present status of the alleged "state action"[16] in this case (which

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15 Plaintiff has only specifically alleged in support of her university-wide conclusory allegations that she alone on various occasions in the past has unsuccessfully applied for jobs for which "many [not exclusively] Latins and non-whites were selected," and that in the past some black applicants were sought. This Court is obviously not the forum to try the merits of plaintiff's allegations. However, their conclusory nature concerning a "policy" controversy with FIU is further highlighted by a contemporary suit against FIU for alleged university-wide discrimination against blacks. See Lucky v. Board of Regents, 26 Empl. Prac. Dec. (CCH) ¶ 32,071 (S.D. Fla. 1981) (Order on Plaintiff's Motion for Class Certification).

16 While many of the Court's decisions support a contrary conclusion, e.g., Parratt v. Taylor, supra, 49 U.S.L.W. at 4511, it could be argued that the alleged wrongs in this case were not "[m]isuse[s] of power . . . made possible only because the wrongdoer[s were] clothed with the

(Cont. page 29)

status neither a "proper defendant" nor a "proper claim" alone would change) further supports the application of a flexible exhaustion rule to assure the necessity for exercising federal jurisdiction. Parratt v. Taylor, supra. Of course, application of the literal due process analysis in Parratt does not apply to an equal protection claim. Yet, the literal remedial language of § 1983 ("Every person who, under color of [law] ...") combined with the 14th Amendment's literal prohibition ("[n]or shall any State ... deny to any person ... equal protection of the laws") provide support for the lower court's conclusion that any necessary federal intrusion should come after the state, through its administrative

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authority of state law," Id. at 4515 n.10 (Powell, J. concurring), but misuses of an employer's prerogative that exist independent of the employer's private or governmental status. Cf. Polk County v. Dodson, supra at 4079.

procedures and institutions, has had an opportunity to act. Id. at 4513 (quoting Judge Stevens) (citation omitted). Unless "government-halting" hearings to prevent possible discrimination must precede every employment decision, the states cannot reasonably do more than prohibit, and provide adequate redress for discrimination.[17]

E. Promotion Of Contemporary Congressional Policies

In this century Congress has, to a substantial degree, institutionalized the

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17 Given these realities, exhaustion need not be limited to cases where remedies can only be invoked between the time of the wrongful decision and its implementation. In most cases, the unconstitutional decision or action and its initial effects occur too close in time to permit any gap for remedial purposes. Where such a gap does exist it enjoys little, if any, vitality in current limitation-period jurisprudence. E.g., Chardon v. Fernandez, ___ U.S. ___, 50 U.S.L.W. 33-41 (1981). Similarly, for exhaustion purposes, a functional distinction need not be drawn between preventing harm before it occurs and remedying it after it occurs - at least in situations where state or local agencies cannot reasonably prevent its occurrence.

"partnership role" played by state institutions, procedures, and laws in the protection of civil rights - particularly employment discrimination. See, e.g., Title II (Public Accomodation) and Title VII (Employment) of the Civil Rights Act of 1964 (as amended), 42 U.S.C. §§ 2000a, 2000e. See also 42 U.S.C. § 1988; Carlson v. Green, 446 U.S. 14, 49 (1980) (Rehnquist, J. dissenting). Given this deference to state procedures or state law mandated by Congress, one can hardly conclude that the contemporary congressional policies are to deny, in iron-clad fashion, the states and their agencies an initial opportunity to protect their own citizens against Constitutional wrongs, particularly where that opportunity will not deny necessary immediate or ultimate access to federal courts. Of course, the Court has emphasized the independence of § 1981 and Title VII remedies for employ-

ment discrimination. Johnson v. Railway Express Agency, 421 U.S. 454 (1975). However, the broad institutional point remains the same: Congress has demonstrated a substantial degree of trust in state agencies, laws, and procedures -- particularly in the area of employment discrimination. Intentional employment discrimination factually remains the same wrong whether a remedy is sought under Title VII, § 1981, or § 1983. Logic and common sense suggest that congressionally-mandated resort to state procedures under one label does not change to contemporary congressional distrust of those same institutions when the remedy label changes. Cf. Id. at 456 n.3.

F. Judicial Policies

Apart from Article III concerns, a substantial body of the Court's precedent amply supports the conclusion that a flexible exhaustion rule promotes other

important judicial policies. See, e.g., FAIR v. McNary, 50 U.S.L.W. at 4023 n.5 (citations omitted). For example, the administrative process may produce a resolution wholly satisfactory to the claimant and thus avoid the necessity for judicial intervention. Moreover, where, as in the case sub judice, the allegations are broad and conclusory, the administrative process should sharpen issues, highlight material facts, and generally facilitate (at much less expense to both parties) subsequent judicial action, when and if such action becomes necessary. As a result, both parties and the courts will benefit.

G. Elimination Of Unfairness And Potential Due Process Concerns

The Court below specifically considered the "unfairness" of a flexible exhaustion rule applicable to federal but not state wrongs. (PA 48a-49a) This inequity may have constitutional dimen-

sions. If FIU or the Board is a § 1983 "person" and entitled to Fifth Amendment protection, then the potential consequences to this employer (from government-impairing punitive and compensatory damages under § 1983) for employment discrimination while federal employers enjoy immunity from such consequences may raise due process questions. See Brown v. GSA, 425 U.S. 820 (1976).

II. STARE DECISIS DOES NOT PRECLUDE THE COURT FROM ADOPTING A FLEXIBLE EXHAUSTION RULE.

A. Beginning With McNeese, The Court's Administrative Exhaustion Cases, Upon Clarification, Fit Within The Mainstream Of Traditional Exceptions To The Court's Well-Established Exhaustion Doctrine

The Court below, other circuits before it, and many commentators have carefully analyzed the Court's holdings in earlier § 1983 exhaustion cases and concluded that they do not necessarily

establish an iron-clad rule. See generally, PA 33a-36a; O'Conner, Trends In A Relationship Between Federal And State Courts From The Perspective Of A State Court Judge, 22 Wm. & Mary L.Rev. 801, 809 n.44 (1981); 41 U. Chi. L.Rev., supra; Developments, 90 Harv. L.Rev., supra, 1264-1273; 54 N.Y.U. L.Rev., supra, 739 n.78; Comment, Exhaustion of State Administrative Remedies Under The Civil Rights Act, 8 Ind. L.Rev. 565 (1975); Aldisert, Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts On Section 1983, Comity, And The Federal Case Load, 1973 Law & Soc. Order 559, 563-67 (1973); Note, Limiting The Section 1983 Action In The Wake Of Monroe v. Pape, 82 Harv. L.Rev. 1486 (1969); Comment, Exhaustion Of State Administrative Remedies Under The Civil Rights Act, 68 Colum. L.Rev. 1201 (1968) (citations omitted).

The Board's voice could add little to the persuasive force of the commentators, the lower court below, or other courts by merely reciting their observations. However, to those voices the Board would add that the Court's language in McNeese emphasizes the critical import of a flexible exhaustion rule: "[r]elief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy." 373 U.S. 668, 671 (1963) (emphasis added). Under no circumstances would necessary federal § 1983 relief be "defeated" by application of a flexible exhaustion rule. Cf. Board of Regents v. Roth, 408 U.S. 564, 586 n.2 (Douglas, J., dissenting).

Contrary to petitioner's suggestion, it is far from clear that the Court has fully considered and rejected a flexible

exhaustion rule.[18] It does seem clear, however, that the Court has never specifically addressed, let alone rejected, several of the reasons advanced by the court below in adopting a flexible rule, e.g., disparate treatment of state and federal defendants, federalism and comity, and Article III "ripeness". Indeed, prior to its modern § 1983 cases, the Court had long held that 14th Amendment claims were subject to an exhaustion requirement to avoid premature and poten-

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18 The mere fact that there exists a broad general expression on which a decision could have been alternatively grounded is insufficient to invoke the doctrine of stare decisis. In order to attain the force of a holding, a question must be actually before the Court, investigated with care, and considered in its full extent. Humphrey v. United States, 295 U.S. 602, 627 (1935); Cohen v. Virginia, 19 U.S. (6 Wheat) 399 (1821) (Marshall, C.J.). That counsel raises an issue in an appellate brief, does not determine the extent to which the Court actually investigated the issue. Thus, the briefs cited by petitioner - particularly given their content - do not establish the proposition that this Court has "thoroughly" considered the merits of a flexible exhaustion rule. Cf. PB 18 n.12. See also Comment, 41 U. Chi.L.Rev., supra at 542-43 n. 27.

tially unnecessary judicial intervention and to assure the existence of a concrete "case or controversy." Prentis, supra at 229. In addition, the Court has never been fully presented with any positions by Congress concerning a flexible rule. See Part III.

In sum, since the holding of the case below rests in part on grounds which the Court has never specifically rejected, and since McNeese and its progeny can be clarified and placed within the mainstream of this Court's well-established exhaustion doctrines, stare decisis does not preclude the Court from adopting a flexible exhaustion rule. See Monroe v. Pape, 365 U.S. at 221 (Frankfurter, J., dissenting); Girouard v. United States, 328 U.S. 61 (1945); Smith v. Allwright, 321 U.S. 649 (1943); Hertz v. Woodman, 218 U.S. 205, 212 (1909).

B. Even If Clarification Of The Court's Prior Decisions Alone Would Not Permit Adoption Of A Flexible Exhaustion Rule, Stare Decisis Would Not Preclude This Choice

Contrary to petitioner's assertions, PB 18 n.12, if the Court has in fact adopted an iron-clad no-exhaustion rule, it would prove more accurate to describe that end result as having been reached in an "almost off-the-cuff manner" without plenary consideration and full briefing by the parties. City of Columbus v. Leonard, cert. denied, 442 U.S. 905, (1979) (Rehnquist, J., joined by Burger, C. J., and Blackmun, J., dissenting); Runyon v. McCrary, 427 U.S. 160, 186 (1976) (Powell, J., concurring). Apart from this fact, Monell v. Department of Social Services, 436 U.S. 658, 709 n.6 (1978) (Powell, J., concurring), the Court need not remain inflexibly bound by seemingly-categorical language in prior

decisions for several cogent reasons. Id. at 696-701.

First, a flexible exhaustion rule would not contradict the intent or purposes of the 42nd Congress. See Part I C. Moreover, aside from the critical inaccuracies, see Part III, infra, the views of subsequent Congresses do not require a contrary conclusion. Consumer Product Safety Commission v. GTC Sylvania, 447 U.S. 102, 118 n.13 (1980); United States v. Clark, 445 U.S. 23, 33 n.9 (1980); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 758 (1979); TVA v. Hill, 437 U.S. 153, 193 (1978); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 353 n.39 (1979); Monroe v. Pape, supra at 221 (Frankfurter, J., dissenting).

Second, given the Court's otherwise well-established exhaustion doctrines in § 1983 and 14th Amendment cases prior to Monroe and McNeese, it can hardly be

argued that the latter were not departures from prior decisions concerning the need to exhaust adequate administrative remedies.

Third, a flexible exhaustion rule would not frustrate alleged reliance on a contrary iron-clad rule by the legions who have sought, and may continue to seek premature, if not unnecessary relief in a federal forum. A flexible rule would in no event bar necessary access to court and its potential adoption by the Court would likely have only prospective application.

Fourth, given that the Congress in 1871 needed to provide claimants with a forum for relief, it defies logic, if not history to suggest that that same Congress would have attempted to preclude flexible application of a judicial rule which provided claimants with relief more promptly through administrative channels

and without injury to federal court access when such access is necessary.

Finally, petitioner's arguments that Congressional reactions to the Court's decisions have "cast in stone" this alleged iron-clad rule, apart from other inaccuracies, see Part III, infra, ironically contradict history. Congressional silence or acquiescence in substantive holdings of the Court, let alone ones that concern rules of judicial administration, fortunately need not woodenly perpetuate prior statutory interpretations. E.g., Monell, supra; Monroe v. Pape, supra, 365 U.S. at 221. Of course, the perceived intent of Congress carries weight in matters of statutory interpretation. Cf. Brown v. GSA, supra. However, under the Constitution's separation of powers, the unquestionable duty of the courts is to interpret the Constitution and laws in a proper 'case or controversy.' Marbury

v. Madison, 1 Cranch (U.S.) 137 (1803); General Electric Co. v. Gilbert, 429 U.S. 125 (1976). Once performed, that duty does not cease solely by virtue of Congressional acquiesence. To argue otherwise would negate the principle of separation of powers and ironically ignore progressive changes in the protection of fundamental rights under the 14th Amendment and § 1983 by the courts despite Congressional acquiesence in earlier decisions. See generally Higginbotham, Pound Conference, The Priority of Human Rights in Court Reform, 70 F.R.D. 79, 134, 140, 147 (citations omitted) (1976).

III. CONGRESS HAS NOT PRECLUDED THE ADOPTION OF A FLEXIBLE RULE IN § 1983 CASES.

A. Congress Has Consistently Respected Procedural Rules Of Judicial Administration By Which Federal Courts Historically Have Deferred The Exercise of Jurisdiction Under Otherwise Unqualified Statutory Grants

Many of the Court's doctrines for deferring the exercise of jurisdiction

have developed under unqualified jurisdictional grants. E.g., Ex Parte Royall, supra; Huffman v. Pursue, Ltd., supra; Younger v. Harris, supra; Lane v. Wilson, supra at 274 (implying need to exhaust administrative remedies in § 1983 cases). Yet, none of these important doctrines has ever been viewed by Congress as improper judicial negations of the existence of jurisdiction. Surely a flexible exhaustion rule with no federal-forum-denying consequences, can hardly be viewed otherwise. Indeed, Congress has specifically vested federal courts with control over the exercise of jurisdiction over particular claims or parties in several respects. See generally Rules: 6(b), 13(b), (f), 15(a), (d), 16(6), 19, 20, 23, 24, 41 Fed. R. Civ. P.

As petitioner demonstrates, the Court has often recognized the absence of federal judicial authority to impose

or create substantive duties or rights that differ from those created by Congress, and, in addition, that Congress knows how to enact a statutory exhaustion requirement. (PB 28-49). However, this demonstration ignores the critical distinctions between substantive statutory exhaustion requirements and flexible rules of judicial administration.

In many contexts, Congress has imposed substantive exhaustion requirements that generally stand as inflexible bars to the existence of federal court jurisdiction. E.g., Title VII. These requirements constitute substantive limitations on rights as well as federal jurisdiction. United Air Lines v. Evans, 431 U.S. 553 (1977). In contrast, flexible rules of judicial administration, like the rule adopted below, are strictly procedural, impose no substantive limitations on rights, the existence of federal

jurisdiction, or access to a federal court when and if necessary. Rather, procedural rules of judicial administration have historically served to promote a host of considerations, some of which the Constitution mandates: Article III "ripeness" and "case or controversy" concerns, federalism, and full faith and credit. While such rules have come to enjoy codification at times, e.g., 28 U.S.C. § 2254, Congress has never rejected them - perhaps in recognition of the Constitutional policies they promote, or perhaps out of institutional respect for the separate nature of judicial power once it is granted.

Fundamentally misplaced, petitioner's Congressional arguments do not alter the dispositive nature of these critical distinctions: Congress has not precluded adoption of a flexible exhaustion rule

under § 1983 - particularly in employment discrimination cases.

B. The Most Probative Evidence Demonstrates Congressional Acceptance Of A Flexible Exhaustion Rule

Since Justice Holmes first required 14th Amendment claimants to exhaust non-judicial remedies, Prentis, supra, no Congress has ever amended § 1983 or its jurisdictional counterparts in order to abolish this rule of judicial administration. In primary reliance upon the Court's decision in Lane v. Wilson, supra at 274, most courts applied a flexible exhaustion rule in § 1983 cases at least until McNeese. See generally Comment, 41 Chi. L. Rev., supra at 542 nn.25-26 (citations omitted). Yet, decades of applying a flexible rule produced no statutory changes in § 1983. Despite petitioner's assertions to the contrary, examination of post-McNeese Congresses reveal that the story has

remained the same: Congress has never disapproved of the Court's potential adoption of a flexible exhaustion rule in § 1983 cases.

The legislative history of 42 U.S.C. § 1997e establishes beyond question that Congress listens not only to the Court but to lower courts as well.[19] Despite McNeese and its progeny, (from which petitioner exclusively imputes to their contemporary Congresses' knowledge of an iron-clad no-exhaustion rule), several of

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19 The Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 (Supp. 1980), served the primary purpose of reversing holdings of the Fourth and Ninth Circuits by conferring standing on the Attorney General "to initiate and to intervene in suits to redress serious and pervasive patterns of institutionalized abuse." H. Conf. Rep. No. 96-897, 96th Cong. 2d Sess. 9 (1980); see also 125 Cong. Rec. H 3638 (daily ed. May 23, 1979) (Rep. Rodino); Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcommittee on the Constitution of the Committee on the Judiciary, 95th Cong., 1st Sess. 364 (1977).

the circuits have long applied flexible exhaustion doctrines, and Congress has specifically failed to codify an iron-clad rule. Unlike petitioner's tautological and sophistical "arguments," this observation enjoys firm evidentiary support.

Beginning at least as early as 1977, both houses of Congress have repeatedly proposed bills to amend § 1983, under the title "The Civil Rights Improvement Act," that would have attempted to preclude the application of flexible administrative exhaustion rules in § 1983 cases.[20] The chief proponent of this legislation in the

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20 See S.1983, 96th Cong., 1st Sess., 125 Cong. Rec. S 15991-96 (daily ed. Nov. 6, 1979); S. 35, 95th Cong., 1st Sess., 123 Cong. Rec. S 124 (daily ed. Jan. 10, 1977); H.R. 7520, 95th Cong., 1st Sess., 123 Cong. Rec. H 5257 (daily ed. April 27, 1977); H.R. 6151, 95th Cong., 1st Sess., 123 Cong. Rec. H 3181 (daily ed. April 6, 1977); H.R. 5535, 95th Cong., 1st Sess., 123 Cong Rec. H 2547 (daily ed. March 23, 1977); H.R. 4514, 95th Cong., 1st Sess., 123 Cong. Rec. H 1756 (daily ed. March 7, 1977); H.R. 549, 95th Cong., 1st Sess., 123 Cong. Rec. H 195 (daily ed. Jan. 6, 1977).

Senate, Senator Mathias, intended not only to reverse some of the Court's abstention decisions and exhaustion decisions in the lower courts, but to preclude the Court from squarely adopting an administrative exhaustion rule - a direction in which Senator Mathias perceived the Court was headed. See 125 Cong. Rec. S 15994 (daily ed. Nov. 6, 1979). This legislation has never passed Congressional muster.[21] As many of the lower courts have continued to apply flexible exhaustion rules in § 1983 cases, it can hardly be argued that Congresses of the late 1970's relied upon and accepted the alleged existence of an iron-clad rule in failing to pass legislation that merely attempted to codify it. Petitioner's "subsequent-congressional-intent" argument

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21 Indeed, these repeated bills to amend § 1983 have failed to get out of committee.

needs no further "beating": The probative legislative history presently reveals it to be a "dead horse" - one which § 1997e did not revisit, let alone revive.

C. § 1997e Does Not Preclude The Adoption Of A Flexible Exhaustion Rule

It would prove ironic, if not unnecessary, for the Court to view § 1997e as "casting in stone" (save for such exceptions as Congress shall make) an iron-clad no-exhaustion rule of judicial administration which never received plenary consideration by the Court nor by the Congress which enacted it.

The origin of § 1997e belies petitioner's argument concerning the allegedly "broad intent of Congress" with respect to exhaustion. Designed primarily to confer standing on the Attorney General to sue, the bill acquired an exhaustion requirement, in the words of Representative

Railsback, one of the bill's chief supporters:

> [a]t the urging, frankly, of the Ford Administration [in recognition of the fact] that there had been too many § 1983 petitions [filed by prisoners], 95% of which were thrown out . . . [and so incentives would be created] to try to motivate the states to set up a grievance mechanism.

124 Cong. Rec. 11982 (1978). Interestingly, despite the Ford Administration's urging, and as an indication of how far the exhaustion issue was from the core of the legislation, neither the bill originally introduced in the Senate nor one of the two bills initially proposed in the House contained the exhaustion provision. Cf. H.R. 5791, 95th Cong., 1st Sess. (1977) with H.R. 2439, 95th Cong., 1st Sess. (1977) and S.1393, 95th Cong., 1st Sess. (1977). Of course, the exhaustion requirement needed justification and the Court's perceived "iron-clad" rule

served that purpose well as petitioner's "many references" attests. Apart from these "political realities" which preceded its enactment, the nature and limited scope of § 1997e and the exhaustion rule Congress adopted undercut the broad implications petitioner advances.

Unlike the many proposed "Civil Rights Improvement Act" amendments to § 1983 of the late 1970's [22] § 1997e never presented Congress with an opportunity to amend § 1983. Thus, it never had cause to consider - let alone adopt and reject - any broader class of claims than those covered by the initially proposed legislation (i.e. adult prisoners). In short, petitioner's argument that Congress was unwilling to go beyond a narrow exception to the exhaustion rule,

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22 See generally Koury, Section 1983 and Civil Comity: Two For The Federalism Seesaw, 25 Loy. L. Rev. 659, 700 (1979).

finds no support in the legislative history of § 1997e. Consideration of the bills never went beyond the proposal that prisoners would need to exhaust. Accordingly, since Congress was not presented with any specific choice concerning exhaustion beyond the prisoner context, it can hardly be argued that Congress "decided" to exempt claims of institutionalized persons other than prisoners let alone broader classes of § 1983 claimants.

Moreover, the "hybrid" exhaustion requirement Congress did adopt hardly demonstrates departure from historical acquiesence in, or acceptance of, flexible rules of judicial administration. This even more restrictive, substantive exhaustion rule clearly cannot be interpreted as a modification or elimination of a perceived flexible rule. For example, it seems clear that the § 1997e exhaustion provisions might often serve to impair, if

not deny, full trial de novo access to federal courts in ways unlike a flexible judicial rule.[23]

Apart from the Act's substantive limitations in access by prisoners to the federal courts, a flexible exhaustion/dismissal rule (which would, at most, defer the exercise of jurisdiction) would in many, if not most cases have no practical functional distinctions from the 90-day deferral rule. In fact, based on these functional similarities, it cannot

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23 Having the stamp of Congressional approval, which Congress did not in "bright line" fashion originate, but which were patterned after the state grievance mechanism in California, see H. Rep. No. 96-80, 96th Cong., 1st Sess. 23 (1979), the administrative procedures may often produce results unfavorable to claimants which, while not technically binding on the Courts, may receive greater weight. Cf. Garcia v. Gloor, 609 F.2d 156, 165 (5th Cir. 1980). Moreover, unless the Courts determine exhaustion is not otherwise "appropriate," certification of the procedures by the Attorney General will automatically cause deferral and, if claimants fail to pursue those procedures, waiver of their § 1983 rights. Cf. McGee v. United States, 402 U.S. 479 (1972).

reasonably be argued that Congress had intended to preempt the former.

First, based on the inherent discretion and "minimum conditions" articulated by the appellate court below, a flexible judicial rule would not offer less protection in terms of defining the "adequacy" of administrative remedies than § 1997e. Indeed, just the contrary seems true as § 1997e does not specifically preclude deferrals in cases of "irreparable injury" as does the flexible rule below.

Second, the 90-day deferral period does not automatically commence upon filing suit. It begins to run once the Court determines that exhaustion would be "appropriate" and the available administrative remedies had received certification or substantially complied with minimum standards. This termination could come months after the initial filing. Moreover, the end of the 90-day period

would not, given crowded dockets, necessarily mean immediate judicial attention. Under a flexible rule of judicial administration, prospective claimants (absent the necessity or appropriateness for immediate federal action) would know that they must pursue adequate administrative remedies of a short duration prior to filing suit. Thus, a flexible judicial rule provides claimants with the potential for much shorter gaps of time between resort to administrative remedies and potential judicial intervention which in most cases could be facilitated by an administrative record.

This is not to suggest that the Board contends that a flexible judicial rule ought to be imposed before resort to the Congressional scheme under § 1997e in appropriate prisoner § 1983 cases. While the breath of the decision below could encompass prisoner claims, this case

obviously need not serve as a vehicle to resolve whether § 1997e's exhaustion scheme could possibly co-exist with flexible judicial exhaustion rules. This potential conflict does not exist in other areas such as allegations of employment discrimination. Indeed, the distinctions between employee and prisoner claims serve to reveal why § 1997e provides "a carrot" as well as "a stick" to promote the adoption of satisfactory grievance procedures and yet another reason why § 1997e should not be viewed as pre-empting flexible judicial rules in other areas.

Third, employees have a much different relationship with state and local governmental agencies than do prisoners convicted of state or local crimes. Further, states have generally prohibited employment discrimination and provided their employees with adequate administrative as well as judicial remedies for

any alleged violations. While some states, e.g., California, were found to have adopted adequate if not "model" administrative remedies for prisoners, Congress primarily found that most state remedies were either inadequate or non-existent. Thus, the need arose to create an incentive for development of such remedies. See S. Rep. No. 96-416, 96th Cong., 1st Sess. 34 (1979); see also H. Conf. Rep. No. 96-897, 96th Cong., 2d Sess. 9 (1980); 125 Cong. Rec. S 1717-18 (daily ed. Feb. 26, 1980).

These obvious dissimilarites would have suggested a much greater need for federal court protection of the rights of prisoners than those of employees. Yet, when presented with an opportunity to require prisoners to exhaust adequate state administrative remedies, Congress acted based on such concerns as the fact that "[s]tates [should have]

the primary responsibility for correcting unconstitutional conditions in their own institutions..."[24] and that "a meaningful state grievance procedure would [be] a lot more helpful...to [a] prisoner than a full blown lawsuit under Section 1983."[25] To suggest that this Congressional response has precluded adoption of a flexible exhaustion rule - particularly in state employment and other areas where adequate administrative remedies have long existed - defies not only common sense but the clearly expressed will of Congress concerning the allocation of responsibilities in our federal system for protection of Constitutional rights.

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24 S. Rep. No. 96-416, 96th Cong., 1st Sess. 32 (1979) (emphasis added). See also 125 Cong. Rec. S 6694 (daily ed. May 24, 1979) (Senator Bayh); 124 Cong. Rec. 15445 (1978) Rep. Ertel); Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 H.R. 5791 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee, 95th Cong. 1st Sess. 109 (1977) (Rep. Danielson).

25 124 Cong. Rec. 11976 (1978) (remarks of Rep. Railsback).

D. Petitioner's "Only Congress Can Act" Policy Arguments Misconstrue The Function Of A Flexible Rule And Ignore The Role The Federal Courts Have Historically And Quite Ably Played In The Application Of Statutory Or Constitutional Law To Individual Cases

To be sure, Congress could, if it so desired, amend § 1983 and superimpose an exhaustion requirement for all cases. However, that Congress could enact such legislation does not mean that it would or should. In any event, petitioner's policy arguments concerning why only the legislative branch of the federal government should act need to be made to Congress - not to the Court confronted with a viable choice for returning § 1983 cases to the mainstream of well-established rules of judicial administration.[26]

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26 This argument ironically presents somewhat of an historical inconsistency - petitioner's counsel and her amici, in opposition to an exhaustion requirement in § 1997e unsuccessfully argued, in part, that the Court had previously exercised its authority and resolved the exhaustion issue in ironclad fashion. See NEA's amicus brief at 12-13 nn.8-9.

Apart from being misplaced, petitioner's policy arguments are largely inaccurate.

Given the "broad swath" cut by § 1983, judicial discretion in the application of all but the broadest and most "bright-line" substantive exhaustion requirements would prove unavoidably necessary. Indeed, petitioner's faith in the ability of Congress to draw "bright lines" that would avoid "uncertainties, inefficiencies, and...litigation of collateral issues" (PB 59) seems ironic given the enormous amount of litigation in the lower courts as well as this Court concerning, for example, the exhaustion scheme under Title II. Petitioner's invocation of the concern by Congress for uniformity fares no better. Congress has long acquiesced in the application of extremely varied state statutes of limitation in § 1983 cases and has mandated that federal courts fill various gaps in § 1983

by reference to varied state laws. 42 U.S.C. § 1988. In any event, proper application of a flexible rule would not create enormous litigation over collateral issues or less uniformity (than already exists) in § 1983 jurisprudence.

Assuming that the substance of a claim is "appropriate" for redress by an administrative procedure which can provide (though need not devine, before its use, the merits of a claim and guarantee) relief, and that no risk of irreparable harm exists, then application of a flexible rule would normally require resort to those procedures. Clearly such a rule need not burden the federal courts with litigation over "new" collateral issues nor impair uniform protection of rights. See FAIR v. McNary, supra 4021 n.8.

Allegations of irreparable injury invoke matters long familiar to the federal courts. See, e.g., Rule 65

Fed. R. Civ. P. Similarly, Congress has vested federal courts with substantial discretion concerning whether suits should proceed as class actions (and possibly, therefore, not be subject to any exhaustion requirements). Rule 23, Fed. R. Civ. P. Moreover, the substance of the claim itself, as revealed in the complaint, and examination of the state's written administrative remedies, would often prove all a court need examine to determine whether to impose an exhaustion requirement in a particular case. Further, while some litigation over collateral issues may unavoidably take place initially, that litigation will decrease over time based on salutary principles of stare decisis. Finally, since the federal courts would in all cases remain available to pronounce the final results, any disparities in local and state administrative schemes

would not impair uniform protection of Constitutional rights.

IV. THOUGH PREMATURE, AN ANALYSIS OF THE ADMINISTRATIVE REMEDIES AVAILABLE TO PETITIONER DEMONSTRATES THEIR ADEQUACY, APPROPRIATENESS, AND SIMPLICITY.

Pursuant to its efforts to protect the civil rights of its employees,[27] the State of Florida has established adequate "other proper proceedings" by which a claimant may remedy employment discrimination. The administrative remedies available to petitioner are neither onerous, nor illusory; they were, in fact, specifically designed to provide fair, efficient and prompt redress. Given the factual matters raised by petitioner's contrary assertions, the Court need not

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27 The Constitution of the State of Florida extends protection to all natural persons. Article 1, Declaration of Rights, Constitution of Florida. In addition, a statutorially mandated employment policy governs all state agencies functioning as employers. Fla. Stat. Ann. § 110.105(2); see also Fla. Stat. Ann. § 112 (affirmative action policy).

address them in the first instance. Dothard v. Rawlinson, 433 U.S. 321, 323 n.1 (1977). However, the nature of petitioner's potential administrative remedies are a matter of public record.[28]

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28 First, petitioner may seek redress of her grievance through the Human Relations Commission, established by the Human Rights Act of 1977, as amended, Chapter 23, Part IX, Fla. Stat. (Chapter 9D-9, F.A.C., establishes rules governing proceedings before the Human Relations Commission).

Second, in the alternative, as a career service employee of FIU, petitioner may utilize procedures set forth at Chapter 6C8-4.05, F.A.C. See also PA 53a-54a. In addition, a claimant could also appeal a final order resulting from these procedures where non-compliance with the procedures is alleged. Chapter 22A-10.01, et seq. F.A.C.; see also, Chapters 22M and 22K, F.A.C.

Third, pursuant to Chapter 22A-7.12, F.A.C., all state agencies must comply with Florida's Administrative Procedure Act, codified at Fla. Stat. Ann. § 120. A formal proceeding is required whenever the substantial interests of an employee are adversely affected by agency action and there is a disputed issue of material fact. Fla. Stat. Ann. § 120.57(1). See also, Dickerson v. Rose, 398 So. 2d 922, 925 n.4 (Fla. 1st Dist. Ct. App. 1981). As noted in Ex Rel., Dept. of General Services v. Willis, 344 So. 2d 580, 592 (Fla. 1st Dist. Ct. App. 1977): "The proper way for a substantially affected person to invoke a formal or informal 120.57 hearing is simplicity itself: he asks the agency for it."

These agency procedures provide an orderly system of review and appeal for alleged employment discrimination and on their face meet the "minimum conditions" delineated by the appellate court below.[29]

Unlike the "remedies" scheme in McNeese, which afforded only "tenuous protection" (because of numerical requirements imposed on the claimants and because the Superintendent could only "investigate, recommend and report"),[30] the administrative remedies, noted supra n.28,

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29 See, note 3, supra, PA 50a.

30 Indeed, in McNeese in their appellate brief the ACLU argued, in part, that the only available remedy was judicial - not administrative. See, PB 18 n.12. Cf. Fla. Stat. Ann. § 127.167(13). See also Brief In Opposition To Petition For Writ Of Certiorari at 20-22; Fla. Stat. Ann. § 120.68(1), "[a] preliminary, procedural, or intermediate agency action is immediately reviewable if review of the final agency decision would not provide an adequate remedy." Also, contrary to petitioner's assertion at PB 80, an employer is not entitled to a trial de novo. Fla. Stat. Ann. § 120.68(4).

on their face, provide an efficient, fair, and simple mechanism for relief from alleged employment discrimination commensurate with that requested in petitioner's § 1983 claim.[31] Parratt v. Taylor, supra at 4513 (1981); FAIR v. McNary, supra at 4026-4027 n.24 (1981) (Brennan, J., concurring) (recognizing that unavailability of compensatory or punitive damages would not automatically preclude resort to administrative remedies).

As petitioner recognizes, see PB 77 n.67, she is free to file her complaint in the first instance with the Human Relations Commission, Fla. Stat. Ann. § 23.167(11). If no satisfactory resolution is forthcoming within 180 days, she is then clearly free to resort

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31 Petitioner clearly recognizes that she could have proceeded through FIU's career service employee grievance procedure and exhausted those remedies within 75 days. PB 85. As petitioner also recognizes, under these proceedings she could have received the relief which she is seeking - promotion. PB 88.

to a judicial forum.[32] Fla. Stat. Ann. § 23.167(12); PB 86 n.72. Though, perhaps for tactical reasons, petitioner chose to characterize the above facts as a "technical matter," see PB 77 n.67, her attempts at obfuscation only highlight the nature of her present "plight": her administrative remedies are adequate, appropriate, and, in fact, quite simple. Petitioner's participation in the administrative process after 180 days is clearly optional, though probably beneficial,

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32 Fla. Stat. Ann. § 23.167(12). Indeed, Congress has explicitly approved a 240 day deferral period when claims of employment discrimination are alleged against private and state employers in deferral states. 42 U.S.C. § 2000e-5(b) (1979). In addition, the incentives are clearly on the state, as employer, to fully and fairly investigate and resolve valid complaints within this time frame.

given the present backlog of cases in the federal courts.[33]

Finally, petitioner's "futility" argument, PB 87-88, clearly involves factual matters which are best developed at trial. For example, what was the true nature and extent of this meeting? Was petitioner, perhaps, directed to utilize her available administrative remedies? The mere allegation that a one hour meeting took place after which four months elapsed without producing a satisfactory response proves little, if anything. Any meaningful conclusion derived from this meeting hinges on facts not in the record. In addition, even assuming petitioner had sought relief through the university

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33 As reported in the Florida Commission on Human Relations Annual Report 1980-81, the Commission has resolved 3,533 (41%) of all employment discrimination claims it has received since its creation in 1978, resulting in monetary awards to plaintiffs totalling over one million dollars. In fact, 61% of these claims were resolved at intake.

administrative process on the date she filed her federal court action, a different university President would have, in fact, reviewed her claim, Dr. Harold Crosby. Presently, there is yet another individual holding that position, Dr. Gregory Wolfe. Thus, there is absolutely no evidence that, upon remand, petitioner's exhaustion of her administrative remedies would be "futile." In any event, this remedy is only one of several available.

CONCLUSION

For the foregoing reasons the Board respectfully submits that the Court can, and for most compelling reasons should recognize that as we approach the 21st Century, this nation's § 1983 jurisprudence can, if not must, accommodate a flexible exhaustion rule. As our history records, this Court's wisdom has

well-served the changing needs of our federal republic while faithfully assuring the protection of constitutional rights. It would prove ironic, unnecessary and costly if this flexible and salutary course of history were altered because of a wooden and anachronistic interpretation of one of the chief instruments that enabled it to be written. Indeed:

> [o]ne of the strenghs of our federal system is that it provides a double source of protection for the rights of our citizens. Federalism is not served when the [state half] of that protection is [prematurely and unnecessarily removed].[34]

The Board respectfully prays that the judgment below be affirmed.

Respectfully submitted,

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January, 1982

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34 Brennan, State Constitutions And The Protection Of Individual Rights, 90 Harv. L. Rev. 489, 503 (1977).